

## COMMENTS

### SLIPPING THE BONDS OF FEDERALISM

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There are three tales told about federalism, but only one of them is true. The first is the nationalist's tale. It depicts federalism doctrine as Shakespearean comedy. Always fanciful, sometimes silly, the story supplies moments of consternation and doubt. But the villain turns out to be mostly harmless and easily outwitted. All's well that ends well. The second is the tale told by those who believe in state sovereignty — an epic story of heroes depicting battles against impossible odds and often ending, as did *Beowulf*, with death and loss. The third story, and the true one, is a tragedy — or at least a tale of tragic choices. It is a story of the failure of craft, of law's best principles bumping up against doctrine's worst frailties, of the conflicting obligations we place on judges. That is the real story of "Our Federalism."<sup>1</sup>

While the "curious case"<sup>2</sup> of *Bond v. United States*<sup>3</sup> (*Bond*) ended up being one of the less important chapters of this Term, it folds easily into each of these storylines. That's because it is a stand-in for much of what's wrong with federalism doctrine, and it should be a signal to us all that, no matter which tale we prefer, it's time for a new narrative. The question isn't how *Bond*'s two opinions will shape future federalism doctrine. The question is whether we can slip federalism's many *Bonds* and start anew.

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If you believe that law is a craft, as I argue in Part I, you are likely to believe two things about federalism doctrine. The first is that the federal government is a government of limited powers. The second is that the Court has never figured out how to limit federal power with-

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<sup>1</sup> *Younger v. Harris*, 401 U.S. 37, 44 (1971).

<sup>2</sup> *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014).

<sup>3</sup> 134 S. Ct. 2077.

out violating the rules of craft<sup>4</sup> that prompted it to enforce those limits in the first place. As a result, judges are put to a tragic choice in federalism cases: do nothing to limit federal power or do something . . . silly. And now, almost two decades into the so-called “new federalism,” the Court has rendered a decision in *Bond* that manages to do both. Sadly, *Bond* isn’t the only evidence that the Court has reached a dead end in federalism doctrine; it’s merely the latest.

Every revolution sows the seeds of its own destruction,<sup>5</sup> and so it is with the Court’s federalism revolution. Certainly the current mess can be traced back to the mistakes of the Rehnquist and Roberts Courts. After spending decades leaving federalism battles to politics, the Justices have tried to extricate themselves from the political thicket only to back themselves into a legal thicket instead. They’ve chosen a path that has led courts into the tangled underbrush of lawyers’ tricks and logicians’ games. It is admirable that the Justices have tried to do *something* to fulfill their constitutional obligations. The problem is that they’ve done the wrong something.

If we retrace the Supreme Court’s path, however, we can imagine a new, better course. That’s because, as I explain in Part II, the Rehnquist and Roberts Courts have offered us two kinds of federalism decisions. Some start with the states. They mark where Congress’s power ends by identifying where state power begins, using sovereignty as a touchstone. Others — including most of the decisions of the Roberts Court — start with Congress and attempt to delineate the bounds of its power without reference to the states.

While it is conventional to note that federalism cases come in these two flavors, the mistake we make is to treat both lines of doctrine as if they are equally flawed. They are not. The cases that rely on state sovereignty to limit federal power are misguided, but we should give the devil his due. These decisions have managed to generate doctrine that is more manageable, more comprehensible, and therefore more likely to endure.<sup>6</sup> The cases that define federal power in isolation have

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<sup>4</sup> By describing law as a craft, I mean only to invoke lawyers’ shared professional sense of the difference between strong arguments and weak ones, between well-formulated doctrine and badly formulated doctrine. Badly crafted doctrine still enjoys the force of law, but it does not enjoy the respect of the profession.

<sup>5</sup> Karl Marx & Friedrich Engels, *Address of the Central Committee to the Communist League*, in 2 THE MARX-ENGELS READER 501, 506 (John C. Tucker ed., 2d ed. 1978).

<sup>6</sup> I begin my analysis at a different place than does Professor John Manning’s excellent and engaging Foreword. Manning objects to the courts’ doing this type of reasoning in the first place. He insists that the Court should defer to Congress’s judgments on these issues. See John Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1 (2014). I address a different question. If one assumes that courts will continue to decide these questions in the fashion they have during the last few decades, *how* should they go about deciding? My argument thus assumes that the courts will continue to engage in what Professor David Strauss has called “common law constitutionalism,” *Common Law Constitutional*

been a failure on almost any measure. Because they attempt to identify limits through sheer force of logic, the doctrine they generate amounts to little more than logic games, which can be played by both sides of any issue. This doctrine is unlikely to endure, and there will be little reason to mourn its passing.

Part III argues that the federalism opinions that begin with the states have chosen the right starting point but headed in the wrong direction because they've followed the trail marked by the sovereigntists. As John Hart Ely quipped about the "one person, one vote" doctrine,<sup>7</sup> manageability is sovereignty's long suit, but it's not clear what else it has going for it. The Court is correct to define federal power in relational terms, but it's missed how that relationship actually works. The states and the federal government regulate shoulder-to-shoulder in the same, tight policymaking space. In doing so, they have forged vibrant, interactive relationships that involve both cooperation and conflict. They are not — as both the Court's sovereignty account *and* the academy's preferred autonomy account would have us think — engaged in the governance equivalent of parallel play. If the Court is going to generate doctrine that is not only enduring but worth preserving, the case law must reflect these realities.

#### I. HOW CAROL ANNE BOND'S SAD STORY BECAME PART OF FEDERALISM'S TRAGIC TALE

*Bond* certainly provided colorful enough characters to hold any reader's attention.<sup>8</sup> Carol Anne Bond discovered that her best friend was pregnant. This would have been cause for celebration but for the fact that Bond's husband was the father. Rather than resort to tea and sympathy — or to what Germans refer to as *kummerspeck*<sup>9</sup> — Bond decided to poison her rival by smearing toxic chemicals on her best friend's property. Enter the local police, the Keystone Cops in our storyline, who dismissed the best friend's discovery of white dust on her car, doorknob, and mailbox. Federal officialdom intervened in the form of the oft-mocked postal service. The post office ran surveillance (who knew it could do that?), and the crime was discovered. While state officials declined to prosecute Bond for this conduct, the U.S. Attorney decided to make a federal case of it, literally and figuratively. The federal government charged Bond with violating 18 U.S.C. § 229,

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*Interpretation*, 63 U. CHI. L. REV. 877, 884 (1996), and my Comment is addressed to which variant they should pursue.

<sup>7</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 121 (1980).

<sup>8</sup> The basic facts in this paragraph can be found in *Bond*, 134 S. Ct. at 2085–86.

<sup>9</sup> This is the German word for the weight gained after one's heart is broken. Its literal translation is grief bacon, which puts it near the top of the list of words that ought to exist in the English language but don't.

which was part of a statute<sup>10</sup> implementing the international Convention on Chemical Weapons<sup>11</sup> (“the Convention”).

This local tale of woe got swept into the maelstrom of national movements. This was, after all, a perfect test case for challenging *Missouri v. Holland*’s<sup>12</sup> ruling that if a “treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8 as a necessary and proper means to execute the powers of the Government.”<sup>13</sup> Paul Clement, one of the stars of the conservative lawyering firmament, rode to Bond’s rescue, or at least to her counsel’s table. One set of amicus briefs was penned by Professor Nicholas Rosenkranz, whose job talk on *Missouri v. Holland*<sup>14</sup> had been dismissed by some as unrealistic. The case handed him a rather impressive rejoinder to his critics.

*Bond*’s procedural history is unusual. It’s rare for a case to make it to the Supreme Court twice, but this one did. The first time the Court granted certiorari, it did so to resolve a standing challenge. Bond had alleged a Tenth Amendment defense, and the federal government had initially insisted that only the state could raise such a challenge. Justice Kennedy stepped into his traditional role, waxing eloquent about the relationship between federalism and individual liberty. He penned *Bond v. United States*<sup>15</sup> (*Bond I*), which held that individuals have standing to litigate a federalism challenge.<sup>16</sup>

The case returned to the Court this Term, teeing up the challenge to *Missouri v. Holland* that the conservatives wanted to raise. Briefed, litigated, and argued with verve, the case spent seven long months in the Justices’ hands before being released in early June. Some speculated that the delay meant that the case had sparked especially vigorous dissents or that Chief Justice Roberts, the presumed author, had lost his majority.

*Bond*, however, concluded with an ending roughly as disappointing as that of *Bartleby the Scrivener* (or, for the Hulu set, the final episode

<sup>10</sup> The statute was, to waste too much of my limited word count on precision, the Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified as amended in scattered sections of the U.S. Code).

<sup>11</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317.

<sup>12</sup> 252 U.S. 416 (1920).

<sup>13</sup> *Id.* at 432. Indeed, the federal government itself pushed the courts toward that question by waiving its Commerce Clause defense.

<sup>14</sup> Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).

<sup>15</sup> 131 S. Ct. 2355 (2011).

<sup>16</sup> *Id.* at 2360. For an in-depth and critical analysis of *Bond*’s standing ruling, see Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435 (2013).

of *Lost*).<sup>17</sup> In an opinion authored by the Chief and joined by the Court's liberals as well as Justice Kennedy, the Court declined to resolve the *Missouri v. Holland* challenge. Looking to the statute implementing the Convention, it instead applied a conventional canon of construction in a fairly unconventional fashion, finding ambiguity where none existed.<sup>18</sup> Chief Justice Roberts indicated that the Justices would be shocked, shocked if Congress intended § 229 to reach this "purely local crime"<sup>19</sup> and thus invoked *Gregory v. Ashcroft*'s<sup>20</sup> plain statement rule to read Bond's shenanigans out of the statute's ambit.<sup>21</sup>

Justices Scalia, Thomas, and Alito concurred in the judgment, each writing his own opinion. Justice Scalia offered a blistering critique of the Chief's statutory analysis and resolved the *Missouri v. Holland* question along the basic lines suggested by Rosenkranz; he insisted that the Necessary and Proper Clause does not confer an independent power on Congress to implement a treaty.<sup>22</sup> Justice Thomas, as is his wont, took his own, originalist path to overruling *Missouri v. Holland* — positing limits on the Treaty Power itself.<sup>23</sup> And Justice Alito (mostly) went along for the ride.<sup>24</sup>

While the decision was a trivial entry in the federalism canon, it was not without its theatrical delights. The trouble with Chief Justice Roberts's invocation of the *Gregory* presumption, as Justice Scalia gleefully pointed out,<sup>25</sup> was that the statute wasn't ambiguous. *Gregory* asks whether Congress has spoken in clear terms, and it had. The statute's language was crystalline, and it plainly applied to Bond's conduct. That's why even as fine a lawyer as the Chief Justice seemed unable to state clearly why the statute was unclear.<sup>26</sup>

It's an aphorism that one will believe something when one sees it, but in *Bond* the reverse was true. The Court could only see what it

<sup>17</sup> Jim Ryan once quipped that writing the Harvard Comment was the academic equivalent of *Iron Chef*, with the Court revealing the mystery ingredient late in the Term and scholars having precious little time to make something of it. The Harvard editors, I suspect, hoped that the mystery ingredient would be lobster. It turned out to be chickpeas.

<sup>18</sup> Whether *Bond* eventually becomes an important statutory interpretation case is yet to be known. It has already led the Sixth Circuit to short-circuit a federal prosecution for child-labor violations based on worries about federalism and the challenges involved in distinguishing between domestic affairs and criminal ones. See *United States v. Toviave*, No. 13-1441, 2014 WL 3800322 (6th Cir. Aug. 4, 2014).

<sup>19</sup> *Bond*, 134 S. Ct. at 2083.

<sup>20</sup> 501 U.S. 452 (1991).

<sup>21</sup> *Bond*, 134 S. Ct. at 2093–94.

<sup>22</sup> *Id.* at 2098 (Scalia, J., concurring in the judgment).

<sup>23</sup> See *id.* at 2103 (Thomas, J., concurring in the judgment).

<sup>24</sup> *Id.* at 2111 (Alito, J., concurring in the judgment and joining Part I of Justice Scalia's opinion and Parts I–III of Justice Thomas's opinion).

<sup>25</sup> *Id.* at 2094–102 (Scalia, J., concurring in the judgment).

<sup>26</sup> See *infra* pp. 92–93.

believed, and it couldn't bring itself to believe that Congress had, in fact, passed a statute broad enough to reach Bond's conduct. That's why the Court thought the statute was ambiguous. Because it had to be.<sup>27</sup>

To be sure, the Court might have read the statute as a whole as signaling that Congress didn't intend it to have a local effect despite its clear language.<sup>28</sup> But, as I note below,<sup>29</sup> that move is unavailable to the Court as the Chief insists that § 229 *is* clear enough to prosecute a local actor using exactly the same chemicals if she were a domestic terrorist rather than merely a domestic terrorizer.<sup>30</sup> If the Chief had wanted to take that route, he should have written an opinion that had less to do with the grand principles of federalism and more to do with statutory construction or the (mis)use of prosecutorial discretion.<sup>31</sup>

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For the nationalists, *Bond* followed the comedic tradition of tragedy averted. As with *National Federation of Independent Business v. Sebelius*<sup>32</sup> (*NFIB*) and virtually all of the cases from the so-called federalism revolution, the threat to congressional power turned out to be fleeting. In the end, the Court made a modest change to a statute that had generated few local prosecutions anyway.<sup>33</sup> More importantly, the Court made clear that federal prosecutors can still use § 229 to cast a wide net for domestic terrorists so long as they allow minnows like Bond to slip through.<sup>34</sup> A case that began as a threat to Congress's treaty-implementing power ended up as little more than a sport.

And so it has been with most of the Court's "new federalism" doctrine. Despite one threat after another, the Court has made precious little headway in curbing federal power. Congress has a ready-made workaround to bypass the anticommandeering doctrine,<sup>35</sup> it can usual-

<sup>27</sup> The Court all but admits as much when it insists that the ambiguity of the statute "derives from [its] improbably broad reach." See *Bond*, 134 S. Ct. at 2090. Justice Scalia makes a great deal of hay out of this misstep. See *id.* at 2095–97 (Scalia, J., concurring in the judgment).

<sup>28</sup> As the author of this Term's Foreword has observed, the language itself "left little doubt about its applicability to the case at hand." Manning, *supra* note 6, at 73 n.414. If there was any play in the joints with regard to the statute's applicability, it could have been found — as Bond's lawyers suggested — in the proper interpretation of the word *peaceful*. The Court, for whatever reason, declined to take advantage of this textual out.

<sup>29</sup> See *infra* pp. 92–93.

<sup>30</sup> *Bond*, 134 S. Ct. at 2092.

<sup>31</sup> See *infra* pp. 92–93.

<sup>32</sup> 132 S. Ct. 2566 (2012).

<sup>33</sup> *Bond*, 134 S. Ct. at 2092.

<sup>34</sup> *Id.*

<sup>35</sup> See U.S. CONST. art. I, § 8, cl. 1. For a fascinating article placing the Spending Clause workaround in historical context and showing how far today's debates have departed from early

ly write in a jurisdictional element to satisfy *United States v. Lopez*,<sup>36</sup> it can borrow a page from Justice O'Connor's "drafting guide"<sup>37</sup> to fit its regulations within the ambit of *Gonzales v. Raich*,<sup>38</sup> it can turn to its taxing power when the Commerce Clause won't do,<sup>39</sup> and it will presumably have no trouble evading the dictates of *NFIB*<sup>40</sup> (unless the Court lends some oomph to its Spending Clause ruling<sup>41</sup>). The nationalists have lost battles, to be sure — *Shelby County v. Holder*<sup>42</sup> being the most heartbreaking defeat — but they are undoubtedly winning the war.

For sovereignty types, *Bond* is yet another setback in the epic battle to stave off an overweening federal government. Justices Scalia, Thomas, and Alito — knights all — were at the ready to meet *Missouri v. Holland* on the field and put the creature down. But Chief Justice Roberts, by now a familiar traitor to the cause thanks to *NFIB*, either couldn't hold that majority or didn't want to.

And what of the third story about federalism, the true one? It's the story told by those who recognize the tragic choice to which judges are always put in federalism cases, the one made plain in *Bond*. As noted above, any lawyer worth her salt believes that the federal government is supposed to be a government of limited powers. But the Court's efforts to impose limits on federal power have led it to write opinions that violate the very dictates of craft that prompted it to enforce those limits in the first place.<sup>43</sup> Whenever the Court tries to cabin Con-

federalism fights, see Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. (forthcoming 2015).

<sup>36</sup> 514 U.S. 549, 561 (1995).

<sup>37</sup> 545 U.S. 1, 46 (2005) (O'Connor, J., dissenting).

<sup>38</sup> 545 U.S. 1.

<sup>39</sup> See *NFIB*, 132 S. Ct. 2566, 2593–601 (2012) (opinion of Roberts, C.J.); see also Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012).

<sup>40</sup> Presumably the federal government could have regulated pretty much everyone if it had applied the ACA to anyone who had purchased health care services within a given period or even, as Professor Jack Balkin observes, at the point of sale. See Jack Balkin, *Supreme Court Year in Review*, SLATE: THE BREAKFAST TABLE (June 28, 2012, 7:08 PM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2012/supreme\\_court\\_year\\_in\\_review/supreme\\_court\\_year\\_in\\_review\\_it\\_was\\_always\\_about\\_the\\_tax.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/supreme_court_year_in_review/supreme_court_year_in_review_it_was_always_about_the_tax.html) [<http://perma.cc/QA9Q-KGAF>].

<sup>41</sup> For an argument on the limited nature of that ruling, see Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 899–901 (2013); and Erin Ryan, *The Spending Power and Environmental Law After Sebelius*, 85 U. COLO. L. REV. 1003 (2014). For a discussion of potential workarounds, see Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1, 53 (2013).

<sup>42</sup> 133 S. Ct. 2612 (2013).

<sup>43</sup> Although the Justices do not express it in precisely these terms, they are well aware of this excruciating dilemma. See, e.g., *Raich*, 545 U.S. at 47 (2005) (O'Connor, J., dissenting) ("The task is to identify a mode of analysis that allows Congress to regulate more than nothing . . . and less than everything . . ."); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (stating that endorsing the

gress's reach, the odds are that the legal analysis in the dissent will be sounder than that in the majority opinion and that the majority's author will (fairly) be accused of returning to the empty formalisms of *Lochner*.

If the Justices don't act, on the other hand, they end up ignoring what most agree to be true — the federal government isn't supposed to be able to do anything it wants. As every law student learns in constitutional law, facts on the ground have outpaced the Founders' vision, as our interconnected system now leaves room for the federal government to regulate virtually everything the states can. That's why the Court's Commerce Clause decisions, in particular, are so easy to dismantle. It's a commonplace that those decisions are trying to limit the limitless. Legal doctrine, in sharp contrast, has its limits, and it has failed the Court time and time again.

So therein lies the tragic choice of federalism doctrine: do nothing or do something silly. One can immediately see this choice embedded as half-truths in federalism's other stories. The nationalists worry about the Court doing something silly. The sovereigntists worry about the Court doing nothing.

What makes *Bond* such a disappointment is that it manages to do both of these things at the same time. It does nothing to trim federal power. Had *Bond* applied the *Gregory* canon rigorously, perhaps the federal government would have been handicapped in its efforts to pursue domestic terrorists. But even though *Bond* will have no meaningful effect on state-federal relations, the opinion is filled with enough analytic holes that it could be dismembered by a 1L, let alone the wily Justice Scalia.<sup>44</sup> As I note below,<sup>45</sup> it makes perfect sense to apply the *Gregory* canon in a case like this. But even setting aside the inconvenient fact that the statute was clear enough to withstand *Gregory*'s test, the Court held back in applying the canon, offering a set of truisms that cannot possibly be true. In one part of the opinion, the Court conceded that a domestic terrorist using the same chemicals deployed by Bond could be convicted under § 229.<sup>46</sup> And yet the Court chided the government for suggesting those chemicals constituted weapons in Bond's hands on the ground that such a reading would

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government's broad definition of commerce "would require [the Court] to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated"; *id.* at 574–75 (Kennedy, J., concurring) (describing the Court's dilemma as being forced to choose between following an unstable doctrine and abandoning its duty to police the federal-state balance of power).

<sup>44</sup> Justice Scalia offers a classic law-and-law attack on these issues, albeit one written with a good deal more panache. Still, almost every criticism is aimed at the majority opinion's lack of craft.

<sup>45</sup> See *infra* p. 96.

<sup>46</sup> *Bond*, 134 S. Ct. at 2091.



convert every family's cleaning supplies into weapons.<sup>47</sup> Even if you buy the Chief's effort to import some variant of intent into the statute, it's not clear it matters that the weapon is domestic. Would the Court, for instance, invoke federalism concerns to limit a prohibition on assaulting a federal officer with a deadly weapon<sup>48</sup> simply because the attacker used a knife from his kitchen? Even the Chief's rhetoric fell short of the standard seen in his usually well-crafted opinions. Surely this is the first time the Court has licensed parents to poison their children's goldfish.<sup>49</sup>

The Chief is one of the Court's finest lawyers and is far too intelligent to miss these problems. That's why Justice Scalia's gentlest critique was also his most telling. The majority's opinion, he wrote, "reads like a really good lawyer's brief for the wrong side."<sup>50</sup>

The question is why *Bond* ended up in the worst of both worlds. We cannot know, of course, what motivated the Justices. But one cannot help but suspect that the conservative majority fully intended to limit *Missouri v. Holland* but discovered that it could not write such an opinion without flouting the dictates of craft. Some dogs don't hunt; some opinions don't write. Because the statute was so tightly tied to the treaty — Solicitor General Donald Verrilli said in oral argument that there was "no daylight"<sup>51</sup> between them — the Justices couldn't accuse Congress of overreach in implementing the treaty. And the Court was apparently unready to declare that Congress lacked the power under Article I to regulate in this arena under any circumstances. Indeed, the majority made clear that it thought Congress could regulate the use of chemicals, even *these* chemicals, when domestic terrorism was involved.<sup>52</sup> The problem, then, as the Chief pretty clearly hints,<sup>53</sup> was an overzealous U.S. Attorney. But the Court isn't about to put limits on prosecutorial discretion and, in any case, doing so would do nothing to limit *Congress's* power.

*Bond*, then, fits perfectly with the nationalists' tale of victory snatched from the jaws of defeat and the sovereigntists' tale of self-defeat. More importantly, it reveals a deeper truth, the one embedded in federalism's authentic narrative. It doesn't just point up the difficult choices judges face in adjudicating federalism questions, but fits

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<sup>47</sup> *Id.*

<sup>48</sup> *See, e.g.*, 18 U.S.C. § 111 (2012).

<sup>49</sup> *Bond*, 134 S. Ct. at 2091.

<sup>50</sup> *Id.* at 2095 (Scalia, J., concurring in the judgment).

<sup>51</sup> Transcript of Oral Argument at 30, *Bond*, 134 S. Ct. 2077 (No. 12-158), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-158\\_1p24.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-158_1p24.pdf) [<http://perma.cc/EWB6-9D4T>].

<sup>52</sup> *Bond*, 134 S. Ct. at 2091.

<sup>53</sup> *Id.* at 2093.

neatly into the story of how judges deal with those choices, as I explain in Part II.

## II. GETTING OUT OF THE LEGAL THICKET: STARTING POINTS, CONCEPTUAL MAPS, AND *BOND*'S DEAD END

What should courts do with the tragic choices federalism presents? Although my instincts mostly lie with the nationalists, I respect the sovereigntists' impulse to do something. Indeed, there are times when the Court *must* do something, when the nationalists' insistence that the courts abandon the field is as unrealistic as the sovereigntists' insistence that they occupy all of it. Because the nationalists' conception of state-federal relations is so behind the times,<sup>54</sup> they've forgotten that the federal government and the states interact all the time, and those interactions inevitably generate questions that the courts must answer. Preemption is just the most obvious example. A great deal of federal administrative law is being carried out by state agents, after all. As my colleague, Professor Abbe Gluck, points out, that means there are legal questions that federal courts must resolve just to carry out their day-to-day duties.<sup>55</sup> Doing nothing isn't always an option.

If courts are going to do something, *Bond* provides but the latest proof that the Rehnquist and Roberts Courts have been doing the wrong something. Both Courts have piled up one failure after another. They've done little to limit federal power, to the great dismay of the sovereigntists, but they've done a fair amount to confirm the nationalists' suspicions about the futility of judicial review. Their opinions have, however, failed in different ways, and therein may lie the clue we need to find a path forward.

It is difficult to generalize about any set of Court decisions. It's a multimember court, facts matter, issues are catch-as-catch-can, and the sample size is small.<sup>56</sup> But if you look at the major decisions issued by the two Courts — the ones where the Court is thinking hard about the right course instead of simply following a settled path carved by prior

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<sup>54</sup> For a critique, see Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014).

<sup>55</sup> See Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996 (2014).

<sup>56</sup> Moreover, because I'm peering at these cases through a single lens — federalism — I am necessarily ignoring many of the reasons that opinions are decided the way they are. The Justices, after all, almost never write on a clean slate, and they are motivated by many things, including their own methodological and ideological commitments. *Bond*, for instance, wasn't just about federalism, but about stare decisis, textualism, international relations, and prosecutorial discretion. For a characteristically thoughtful effort to think through the relationship between the "federalism revolution" and the Rehnquist Court's ideological commitments, see Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002).

decisions<sup>57</sup> — you’ll see a pattern in the landscape. Not a tessellation, but a pattern nonetheless. Some of the Court’s decisions define federal power in relation to the states, and others define it in isolation. The Court itself has acknowledged this difference,<sup>58</sup> and scholars often orient their teaching and writing around the difference between external/sovereignty-based limits on congressional power and those derived internally.

What the conventional account misses, however, is that one set of cases is superior to the other. Academics ignore this fact, preferring instead to declare a pox on both doctrinal houses and thereby to maintain their studied distance from any sort of affirmative commitment. As a result, the scholars who teach and write about these cases typically dismiss both lines of doctrine as muddleheaded and hopelessly outdated without thinking hard about the differences between the two.<sup>59</sup> In actuality, the cases that define federal power in relation to the states are more cogent, more intuitive, and more likely to last past the next round of federalism fights (or confirmation battles, for that matter). Those that define federal power in isolation are failures, plain and simple.

If we pay attention to the differences between these two lines of cases, we see that the choices the Court has made — sometimes defining federal power in relation to the states and other times defining it in

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<sup>57</sup> As is true of the Court’s preemption cases, which I omit from this discussion. Professor Richard Fallon has termed preemption one of the “quiet fronts” in the federalism revolution because the Court has hewed to the existing doctrine in this area. Fallon, *supra* note 56, at 432. For a preliminary view as to where the preemption cases would fit in the scheme I’m suggesting, see *infra* note 100.

<sup>58</sup> Justice O’Connor acknowledged this difference in *New York v. United States*, 505 U.S. 144 (1992), where she observed that some opinions began with an inquiry into Congress’s Article I powers and others considered whether “an Act of Congress invades the province of state sovereignty.” *Id.* at 155. Professor Alison LaCroix frames these cases differently than I do, in part because she reads *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), differently. I think both the Rehnquist and Roberts Courts have offered opinions that define federal power in relation to the states; I also think that both Courts have offered opinions that define federal power in isolation. LaCroix sees a more meaningful distinction between the two Courts. She writes that while the pattern for federalism cases “appeared to be set,” with the Rehnquist Court “analyz[ing] Congress’s Article I powers, especially the commerce power, through the lens of the Tenth Amendment,” now “the battles of judicial federalism are fought not across the well-trampled no-man’s-land of the commerce power or the Tenth Amendment, but in the less trafficked doctrinal redoubts” of the Necessary and Proper Clause and the General Welfare Clause. Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2048, 2049 (2014). She terms the latter the “shadow powers.” *Id.* at 2049. But there are important continuities in our accounts. LaCroix, too, sees the Court’s more recent cases as “motivated more by a concern about the expansion of federal regulatory power itself, and somewhat less by a ‘new federalist’-style belief in a categorical distinction between the proper spheres of state and federal power.” *Id.* at 2050 (footnote omitted).

<sup>59</sup> There are a few, rare exceptions, with LaCroix’s account being the most arresting. See LaCroix, *supra* note 58.

isolation — matter for where the Court ends up and may help us craft a better roadmap for the future.

### A. *Defining Federal Power in Relation to the States*

In a number of its federalism opinions, the Court defines federal power in relation to the states. These opinions pivot off of an account of the role of states in a federal system, which serves as the core justification for limiting federal power. It might seem odd for the Court to look to the states in describing the limits of *federal* power. But the Court does so for a reason. It marks the outer limits of federal authority by identifying the bounds of state power, much the way an artist designates a shape using negative space.

*Gregory* is a textbook illustration. The opinion opens by reminding us that every “schoolchild” learns about our “system of dual sovereignty.”<sup>60</sup> The majority then devotes pages to the important role that states play in a federal system before explaining why a plain statement rule is necessary to ensure states continue to play this role.<sup>61</sup>

Even in those opinions where *Gregory*’s functional justifications don’t dominate the analysis, those justifications are inherently intertwined with the Court’s basic understanding of state power and its role in a federal system. That understanding, of course, is rooted in sovereignty. Sovereignty is an account of both means and ends. In order to fulfill the functional roles outlined in *Gregory* and elsewhere, the Court thinks that states need to preside over their own empires, regulating without federal interference.

*New York v. United States*<sup>62</sup> is a good example. While the Court discusses both state and federal power, what gets the argument up and running is the notion that commandeering intrudes on state sovereignty.<sup>63</sup> Indeed, as the Court hones in on the core constitutional infirmity in the challenged statute — the “take title” provision — its discussion focuses almost exclusively on protecting state sovereignty.<sup>64</sup>

The same is true of *New York*’s companion case, *Printz v. United States*.<sup>65</sup> Because the case is authored by Justice Scalia, it begins with an obligatory dive into original history, centered on what the federal government could demand of state officials in the past and sprinkled with references to state sovereignty.<sup>66</sup> The remainder of the opinion is focused on the need to preserve state sovereignty, a principle that pro-

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<sup>60</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

<sup>61</sup> See *id.* at 457–61.

<sup>62</sup> 505 U.S. 144.

<sup>63</sup> See, e.g., *id.* at 162–66, 168–69, 175–76, 181–82, 187–88.

<sup>64</sup> See *id.* at 174–76.

<sup>65</sup> 521 U.S. 898 (1997).

<sup>66</sup> See *id.* at 905–18. For the most prominent examples, see *id.* at 918–19.

vides the majority's most powerful rejoinder against each of the arguments offered in favor of the Brady Act's constitutionality.<sup>67</sup>

The line of doctrine arising under both the Eleventh Amendment and the Enforcement Clause of the Fourteenth also includes many opinions that focus on the states. The Eleventh Amendment cases dwell heavily on state sovereignty<sup>68</sup> but, to be fair, their focus is overdetermined given the nature of the constitutional inquiry. The same is probably true of the state-centered Fourteenth Amendment cases, where state action is a necessary condition for regulation.<sup>69</sup> But *Shelby County*, which is sheared of any state action questions, is unquestionably an opinion that views federal power through the lens of state-federal relations. It announces the novel idea that federalism limits Congress's power to draw distinctions among the states.<sup>70</sup>

### B. Defining Federal Power in Isolation

Many of the Court's important federalism decisions — including most of the Roberts Court's decisions — eschew the relational account described above and view federal power in isolation. Rather than trace the (state) boundaries that federal power cannot cross, the Court demarcates federal power without looking to the states.<sup>71</sup> Most of the Court's Commerce Clause decisions take this form. *Lopez* and *United States v. Morrison*<sup>72</sup> are almost twins in this respect. Both frame challenges to congressional power as an Article I question that depends on what, precisely, constitutes “commerce” in this day and age. (To the extent that state sovereignty is invoked, it's not invoked to help the Court fashion a doctrinal rule but to rebut the dissents' arguments, and, as I argue below,<sup>73</sup> ends up being the most convincing part of both opinions.) So, too, *NFIB* defines federal power largely without reference to the states.<sup>74</sup> Indeed, the Court seems more concerned with protecting the autonomy of citizens than the sovereignty of states.<sup>75</sup>

<sup>67</sup> See, e.g., *id.* at 918–22, 923–25, 928, 930–31, 932–33, 935.

<sup>68</sup> See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>69</sup> As with the Fourteenth Amendment ruling in *United States v. Morrison*. 529 U.S. 598, 620–22, 626 (2000).

<sup>70</sup> See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623–24 (2013).

<sup>71</sup> LaCroix traces this notion back to Holmes. LaCroix, *supra* note 58, at 2047, 2050–51.

<sup>72</sup> 529 U.S. 598 (2000).

<sup>73</sup> See *infra* p. 109.

<sup>74</sup> With the exception of the Spending Clause, discussed *infra* p. 109, which ends up being the exception that proves the rule.

<sup>75</sup> See, e.g., *NFIB*, 132 S. Ct. 2566, 2587, 2589 (2012) (opinion of Robert, C.J.) (worrying that a given case might open up “a new and potentially vast domain” of “congressional authority,” *id.* at 2587, that would “fundamentally chang[e] the relation between the citizen and the Federal Government,” *id.* at 2589 (emphasis added)); *id.* at 2588–89. What is true of the Commerce Clause

Perhaps unsurprisingly, we see the same pattern of defining federal power independently of the states in the cases where the Court finds that Congress possesses the power to regulate. *Raich* is a good example. It pays precious little attention to the bounds of state power, dismissing them on the ground that if the federal government has power to regulate, that power is plenary.<sup>76</sup> *United States v. Comstock*<sup>77</sup> isn't a Commerce Clause case, but it follows the same pattern, also easily dismissing state sovereignty concerns.<sup>78</sup> So, too, *United States v. Kebodeaux*<sup>79</sup> — *Comstock*'s ugly stepsister — describes an intricate web of federal power and references the states only to the extent that Congress enticed them into its regulatory project with promises of financial support.<sup>80</sup>

*City of Boerne v. Flores*,<sup>81</sup> which set the Court down the path toward placing meaningful limits on Congress's Fourteenth Amendment enforcement authority, also defines federal power in isolation. *Boerne*'s test, which requires legislation to be "congruen[t] and proportional[]" to the underlying constitutional harm, closely scrutinizes the means and ends identified by Congress.<sup>82</sup> With its inquiries into the adequacy of congressional records and the suitability of Congress's remedial choices, *Boerne* reads more like administrative law than anything else. One almost wouldn't know the states were players in the game.

### C. Why a Relational Account Matters

Justice O'Connor insisted in *New York* that inquiries about the bounds of state and federal power are "mirror images of each other,"<sup>83</sup> but she was just wrong about that. When you compare these two sets of cases — those that define Congress's power in relation to the states and those that define it in isolation — it's clear that the former has managed to generate more manageable and stable doctrine.

One might be tempted to describe the difference between these two lines of cases as functional versus formal, but plenty of formalism slips into the cases defining federal power in relation to the states, and those that examine federal power in isolation have their share of functional

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section of the opinion is equally true of the sections on Congress's powers under the Necessary and Proper Clause and the Taxing Clause, where the Court also focuses on individual citizens rather than states in analyzing the limits of federal power. See *id.* at 2592, 2599–600.

<sup>76</sup> *Gonzalez v. Raich*, 545 U.S. 1, 29 (2005).

<sup>77</sup> 130 S. Ct. 1949 (2010).

<sup>78</sup> *Id.* at 1962.

<sup>79</sup> 133 S. Ct. 2496 (2013).

<sup>80</sup> *Id.* at 2501.

<sup>81</sup> 521 U.S. 507 (1997).

<sup>82</sup> *Id.* at 520.

<sup>83</sup> *New York v. United States*, 505 U.S. 144, 156 (1992); accord *id.* at 159.

analysis.<sup>84</sup> No, the real difference goes to manageability. The opinions that center on Congress's powers don't possess a logic of their own, which means that the doctrine is unstable and vulnerable to the manipulations of the logicians' tribe we call lawyers. As a result, the Rehnquist and Roberts Courts — which worked so hard to extricate federalism fights from the political thicket — have found themselves trapped in a legal thicket instead.

*D. The State Sovereignty Cases: When Bad Theory  
Makes for Not-So-Bad Case Law*

As noted above, the cases that define federal power in relation to the states pivot off a sovereignty account. That account is mostly claptrap in my view. But one should give the devil his due. The sovereignty account has managed to generate reasonably coherent doctrine. I recognize that this is an outlier view. But academics always come to bury opinions, not to praise them, and they underestimate the value of what Professor Richard Pildes wisely terms “vague law, stable outcomes.”<sup>85</sup> The Court is always muddling through these questions because these questions are hard. And while I disagree with just about everything the Court says about state sovereignty and would never suggest the doctrine is even close to perfect, it is certainly supe-

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<sup>84</sup> See Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1192 (2003) (arguing that a number of the Rehnquist decisions reflect “a blend of formalism and functionalism”); Ronald Kahn, *The Commerce Clause and Executive Power: Exploring Nascent Individual Rights in National Federation of Independent Business v. Sebelius*, 73 MD. L. REV. 133, 186 (2013) (“Analyzing *Sebelius* demonstrates that the formalist-realist divide is but a legal fiction.”); Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 96–97 (2012) (finding that, with the exception of Justices Breyer and Kagan, all of the opinions in *NFIB* included “pragmatic” and “formalist” approaches); Martha Minow, *Affordable Convergence: “Reasonable Interpretation” and the Affordable Care Act*, 126 HARV. L. REV. 117, 146 (2012) (suggesting that *NFIB* incorporated formalist and functionalist reasoning). For illuminating and quite varied takes on the complex relationship between formalism, functionalism, and federalism in a number of these cases, see Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and *Yeskey*, 1998 SUP. CT. REV. 71; Evan H. Caminker, Printz, *State Sovereignty*, and the *Limits of Formalism*, 1997 SUP. CT. REV. 199, 200–01; Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997); Lawrence Lessig, *Translating Federalism*: *United States v. Lopez*, 1995 SUP. CT. REV. 125, 196–97; and Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995).

<sup>85</sup> Rick Pildes, *Vague Law, Stable Outcomes: The Example of Money and Judicial Elections*, BALKINIZATION (Feb. 16, 2011, 9:58 AM), <http://balkin.blogspot.com/2011/02/vague-law-stable-outcomes-example-of.html> [<http://perma.cc/A35M-RUYW>]; see also Richard H. Pildes, *The Supreme Court, 2003 Term — Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 59 (2004).

rior to what the Court has come up with when it defines federal power in isolation.<sup>86</sup>

The reason the sovereignty-centered cases are superior seems largely due to the fact that they define state and federal power in relation to one another. Judges always need a mediating theory for translating abstract principles into concrete doctrine. Without one, it's hard to decide when to make an exception and when to stick to a rule. The sovereignty account serves just this role. It's an account of means and ends, one that tells us what purposes states serve in a federal system and why it's necessary to protect certain forms of state power from federal intrusion. That account, in turn, lends shape and form to the Court's opinions.

There are several features of the sovereignty account that have served the Court well. First, the states provide something concrete to push up against, some negative space with which to delineate the ambit of congressional power. One can at least comprehend the traditional bounds of state power, after all. That's not to say that, in the abstract, there is anything inherently "state"-like nor to suggest that the notion itself isn't contested or contestable.<sup>87</sup> But there's a there there. We have some idea of what Justice Kennedy terms "the area[s] to which States lay claim by right of history and expertise."<sup>88</sup> You might not be convinced by the cases' logic, but at least the cases possess a logic of their own.

Second, this relational account tells us *why* we worry about federal overreach. Perhaps it's easier to figure out what one owes the world when one remembers there are others in it. If the federal government intrudes on traditional state domains or takes over traditional state functions, so the story goes, it deprives the states of their ability to experiment, set different policies, and resist federal norms. Here again, I think that position is wrong. But at least it's comprehensible.

Third, the means and ends in the Court's account fit logically together. Sovereignty is understood to be a means to achieving the many functional ends the Court has identified states as serving. Protect the right form of state power, the Court tells us, and states can keep playing their important role in "Our Federalism."

Finally, the sovereignty account is, at bottom, an account of how two sets of institutions are supposed to interact with one another. Judges and lawyers are used to thinking in institutional terms. The

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<sup>86</sup> We're obviously comparing batting averages here. The Court sometimes swings and misses even when it defines federal power in relation to the states. *See, e.g., Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

<sup>87</sup> For a history of such contestation, see ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010).

<sup>88</sup> *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring).



Court, of course, always runs the risk of anthropomorphizing government actors and oversimplifying complex relationships. But judges are used to refereeing institutions as they clash with one another.

Except for the Eleventh Amendment decisions, this line of cases has also generated reasonably concrete doctrinal rules that can be implemented with a straight face. The prohibition on commandeering may be fuzzy at the edges, but it's a workable rule that corresponds to a basic intuition: Congress can't take over states' governing apparatuses and force them to do its bidding. The *Gregory* canon is just as intuitive: if you worry about Congress unthinkingly displacing state regulatory authority, you should construe federal legislation carefully. Even *Shelby County*, which pulled its state equality principle out of thin air, at least managed to invent a rule that can be explained to a congressional staffer still wet behind the ears.

As to the Eleventh Amendment cases, they are a mess, but in some senses they may be the exception that proves the rule. These cases are where the Court loses track of the sovereignty storyline. The Justices are *too* focused on the states and not sufficiently attentive to federal-state relations. The sovereignty account dominates here in its most abstract form, with the Court pursuing sovereignty for its own sake rather than treating it as a means to an end. Rather than emphasizing the functional role states serve in "Our Federalism," the Court's doctrine pivots off the idea that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [a State's] consent,"<sup>89</sup> a formulation that all but excludes the federal government from its purview. In this respect, the Eleventh Amendment cases are the mirror image of cases like *Morrison* and *Raich*, which I discuss in the next section. Just as those cases defined federal power in isolation, the Eleventh Amendment cases come close to defining *state* power in isolation. It's perhaps unsurprising that these two sets of cases share so many of the same flaws.

#### *E. Why the Court's Efforts to Define Federal Power in Isolation Have Failed*

When the Court addresses Congress's power in isolation, it creates a challenge for itself: how to bound the boundless. Deprived of the handy stopping point that the sovereignty account provides, the Court must decide how far to follow a chain of reasoning in a world where

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<sup>89</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (first alteration in original) (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)) (internal quotation marks omitted).

the market touches virtually everything and interconnected regulatory regimes can sweep almost anything into Article I's ambit.<sup>90</sup>

It's clear that the pro-federalism Justices are acutely aware of this problem. Indeed, they are all but consumed by a single worry — that supporters of federal power will, as Chief Justice Rehnquist observed, “pile inference upon inference”<sup>91</sup> to justify national regulation by extending the causal chain. Justice Scalia insists, for instance, that *Lopez* and *Morrison* were intended to foreclose a “remote chain of inferences,”<sup>92</sup> and *Morrison* itself indicates that the Court's aim is to cut the “but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce.”<sup>93</sup> In *Sabri v. United States*,<sup>94</sup> Justice Souter acknowledges the worry that the Court will “pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States”<sup>95</sup> but reassures his colleagues that “[n]o piling is needed here.”<sup>96</sup> Justice Thomas, however, is a good deal gloomier about the “chain of inferences and assumptions” involved in the majority's analysis.<sup>97</sup> So, too, in *Raich*, Justice O'Connor worries that the majority's causal analysis means “draw[ing] no line at all, and . . . declar[ing] everything economic.”<sup>98</sup> And in *NFIB*, Chief Justice Roberts rejects the government's Commerce Clause argument because “[t]he individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity.”<sup>99</sup>

We see the same concerns at play outside the Commerce Clause cases.<sup>100</sup> In *Comstock*, Justice Kennedy warns that the Court must pay

<sup>90</sup> As Justice Kennedy admitted in a candid moment, “In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence . . . .” *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

<sup>91</sup> *Id.* at 567 (majority opinion). Chief Justice Rehnquist later characterized his own opinion in *Lopez* as “rest[ing] in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated.” *United States v. Morrison*, 529 U.S. 598, 612 (2000).

<sup>92</sup> *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring in the judgment).

<sup>93</sup> *Morrison*, 529 U.S. at 615.

<sup>94</sup> 541 U.S. 600 (2004).

<sup>95</sup> *Id.* at 608 (quoting *Lopez*, 514 U.S. at 567) (internal quotation mark omitted).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 614 (Thomas, J., concurring in the judgment).

<sup>98</sup> *Gonzales v. Raich*, 545 U.S. at 50 (O'Connor, J., dissenting).

<sup>99</sup> *NFIB*, 132 S. Ct. 2566, 2590 (2012) (opinion of Roberts, C.J.).

<sup>100</sup> Although I exclude the preemption cases from this discussion because the law was largely settled before the “new federalism” kicked in, my preliminary view is that they mostly fit with the set of cases that define federal power in isolation. To be sure, some subsidiary preemption doctrines, like obstacle preemption, take the states into account to some extent. But that's not really the kind of relational account I'm describing here. And most preemption cases center all but entirely on the federal supremacy trump card. Once it's played, the courts' focus is figuring out

attention to the “strength of the [congressional-power] chain.”<sup>101</sup> Similarly, *Boerne*’s test centers on how tight a fit must exist between Congress’s identified ends and the means it has chosen to pursue them — yet another effort to set limits on the causal chain. On LaCroix’s account, the shift to the Necessary and Proper Clause itself is part of this trend, an effort by the Court to set the rules whenever Congress is, in the Justices’ views, “a step removed from an enumerated power.”<sup>102</sup>

The pro-federalism Justices are right to worry. When the Justices who favor national power define federal power in isolation, they typically . . . pile inference upon inference. Justice Breyer is the most explicit about it. In *Comstock*, where the Court held that Congress may detain mentally ill or sexually dangerous prisoners beyond their release date, he maps out his causal chain in great detail. His summary is just the kind of passage that gives his pro-federalism colleagues hives:

[E]ven the dissent acknowledges that Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power, *and also* the additional power to imprison people who violate those (inferentially authorized) laws, *and the additional* power to provide for the safe and reasonable management of those prisons, *and the additional power* to regulate the prisoners’ behavior even after their release.<sup>103</sup>

Little wonder, then, that the concurring Justices each took Justice Breyer to task and tried to show that the causal chain was a good deal shorter. Justice Kennedy insisted that it’s not enough that causal connection can be established: “The inferences must be controlled by some limitations lest . . . congressional powers become completely unbounded by linking one power to another *ad infinitum* in a veritable game of ‘this is the house that Jack built.’”<sup>104</sup> So, too, Justice Alito insisted that “[a]lthough the term ‘necessary’ does not mean ‘absolutely necessary’ or indispensable, the term requires an ‘appropriate’ link between a power conferred by the Constitution and the law enacted by Congress.”<sup>105</sup> In dissent, Justice Thomas worried that Justice Breyer’s

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how far preemption extends. That inquiry, in turn, raises worries about extended chains of reasoning and the absence of limiting principles — the same kinds of worries we see in the cases that define federal power in isolation. Indeed, as soon you start listing the types of preemption rules the Court has created (field preemption, obstacle preemption, express preemption, implied preemption), the phrase “inference upon inference” immediately comes to mind.

<sup>101</sup> *United States v. Comstock*, 130 S. Ct. 1949, 1966 (2010) (Kennedy, J., concurring in the judgment).

<sup>102</sup> LaCroix, *supra* note 58, at 2068.

<sup>103</sup> *Comstock*, 130 S. Ct. at 1964 (emphases added).

<sup>104</sup> *Id.* at 1966 (Kennedy, J., concurring in the judgment) (quoting Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), *in* 31 THE PAPERS OF THOMAS JEFFERSON 546, 547 (Barbara B. Oberg ed., 2004)).

<sup>105</sup> *Id.* at 1970 (Alito, J., concurring in the judgment).

analysis, “if followed to its logical extreme, would result in an unwarranted expansion of federal power.”<sup>106</sup>

This is something of a pattern for the pro-federalism Justices when they concur in an opinion blessing the reach of federal power. They can’t tell you where the chain of inferences should end, but they balk at their brethren’s extending it in such an obvious fashion. *Kebedeaux* mirrors *Comstock* in this respect. It offers a circuitous explanation for concluding that sex-offender registration requirements could constitutionally be applied to James Kebedeaux under the Necessary and Proper Clause.<sup>107</sup> In defending this decision, Justice Breyer wrote at length about the reasonableness of registration programs,<sup>108</sup> prompting his unhappy brethren to rebuke him for — you guessed it — piling inference upon inference. That’s why a holding capable of garnering seven votes nonetheless generated five separate opinions spanning thirty-six pages in the Court’s slip opinion. Chief Justice Roberts worried in his concurrence that Justice Breyer’s emphasis on the public safety benefits of the challenged act would be read to suggest that Congress possesses “a federal police power.”<sup>109</sup> The Chief insisted on confining the case to its facts because the causal chain “is less attenuated, and the power it produces less substantial” than Justice Breyer’s opinion seemed to imply.<sup>110</sup> Justice Alito’s concurrence similarly tried to trim the Court’s chain of reasoning,<sup>111</sup> as did Justice Scalia’s<sup>112</sup> and Justice Thomas’s dissents.<sup>113</sup>

Given these worries, what do the Justices do to limit federal power when they consider it in isolation? What analytic tools do they use to solve the chain-of-inferences problem when they don’t have the states to push up against? They are forced to limit federal power through sheer force of logic, relying on a panoply of lawyers’ techniques to identify federal power’s stopping point.

The most common lawyers’ move the Court makes is to insist that, *by definition*, something isn’t within the ambit of Article I. In effect, the Court avoids the slide by eliminating the slope altogether. As a result, distinctions that played no role in prior cases suddenly take on doctrinal salience. *Lopez* and *Morrison* insist that activities are either

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<sup>106</sup> *Id.* at 1976 (Thomas, J., dissenting).

<sup>107</sup> *United States v. Kebedeaux*, 133 S. Ct. 2496, 2504 (2013).

<sup>108</sup> *Id.* at 2502–05.

<sup>109</sup> *Id.* at 2507 (Roberts, C.J., concurring in the judgment).

<sup>110</sup> *Id.* at 2508.

<sup>111</sup> *See id.* at 2509 (Alito, J., concurring in the judgment).

<sup>112</sup> *Id.* at 2509–10 (Scalia, J., dissenting).

<sup>113</sup> *Id.* at 2511–12, 2514–15, 2517 (Thomas, J., dissenting).

commercial or noncommercial,<sup>114</sup> economic or noneconomic.<sup>115</sup> They even revive the moribund distinction between the “truly local” and the “truly national.”<sup>116</sup> *NFIB* draws a distinction between “action” and “inaction.”<sup>117</sup>

We see the same move being made outside the Commerce Clause cases. Given how easy it is to draw connections between means and ends under *McCulloch*’s generous formulation of the Necessary and Proper Clause, the Justices break the chain of reasoning by insisting that some of its links, by definition, can’t be forged. Justice Scalia asserts that a means chosen by Congress can be necessary to achieving a legitimate end but still not proper,<sup>118</sup> an idea picked up by the Chief in *NFIB*.<sup>119</sup> LaCroix puts another example on the board. She criticizes *NFIB* for pulling the term “great substantive and independent power” from a “decontextualized” reading of *McCulloch*.<sup>120</sup> The Court, LaCroix writes, never explains “the sudden appearance of a new distinction in the case law between permissible uses of the necessary and proper power (for example, to plug holes in existing regulatory schemes) and uses that appeared, in some vaguely defined way, to be simply too large in scale to be permitted.”<sup>121</sup> We see similar efforts in the dissents. Consider, for instance, Justice Thomas’s effort to foreclose certain ends by contending that Congress only possesses the power to carry an enumerated power “into Execution,” imbuing those two words from the Constitution’s text with new doctrinal significance.<sup>122</sup>

The Court’s other main strategy for determining how far the causal chain extends is just as familiar to lawyers — picking the right level of

<sup>114</sup> *United States v. Lopez*, 514 U.S. 549, 566 (1995).

<sup>115</sup> *United States v. Morrison*, 529 U.S. 598, 610 (2000). For an in-depth critique of this distinction, see Craig L. Jackson, *The Limiting Principle Strategy and Challenges to the New Deal Commerce Clause*, 15 U. PA. J. CONST. L. 11 (2012).

<sup>116</sup> *Morrison*, 529 U.S. at 617–18; *Lopez*, 514 U.S. at 567–68. For a thoroughgoing critique, see Neil S. Siegel, *Distinguishing the “Truly National” from the “Truly Local”: Customary Allocation, Commercial Activity, and Collective Action*, 62 DUKE L.J. 797 (2012).

<sup>117</sup> *NFIB*, 132 S. Ct. 2566, 2587 (2012) (opinion of Roberts, C.J.). For challenges to this distinction, see Akram Faizer, *Chief Justice John “Marshall” Roberts — How the Chief Justice’s Majority Opinion Upholding the Federal Patient Protection and Affordable Care Act of 2010 Evokes Chief Justice Marshall’s Decision in Marbury v. Madison*, 11 U. N.H. L. REV. 1, 11 (2013); Jackson, *supra* note 115, at 56–58; Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 125–27 (2013).

<sup>118</sup> *Gonzales v. Raich*, 545 U.S. 1, 39–41 (2005) (Scalia, J., concurring in the judgment).

<sup>119</sup> *NFIB*, 132 S. Ct. at 2592–93 (opinion of Roberts, C.J.).

<sup>120</sup> LaCroix, *supra* note 58, at 2079 (quoting *NFIB*, 132 S. Ct. at 2593 (opinion of Roberts, C.J.)).

<sup>121</sup> *Id.* at 2080 (footnote omitted). For a thoughtful but quite different analysis of this concept, see William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013).

<sup>122</sup> *United States v. Comstock*, 130 S. Ct. 1949, 1972 (2010) (Thomas, J., dissenting) (internal quotation mark omitted).

generality<sup>123</sup> — and here again the Justices tussle over how to play this logic game. The Justices mostly agree on the basic test: is a challenged regulation an integral part of a legitimate statutory regime (and thus within the ambit of Congress’s authority even if the regulation itself, standing alone, would fall outside of it)? But they cannot agree on how to apply that rule. In *Raich*, the regulation of homegrown medical marijuana was deemed an essential part of a legitimate regulatory scheme. But the individual mandate in *NFIB*? Not so much. Even the divisions within those cases boil down to the level of generality at which the regulated activity and the regulation is cast. The same is true of the *Boerne* line of cases, where the game likewise depends on the level of generality at which the constitutional injury is cast. And yet even the Court admits that these distinctions are “not easy to discern.”<sup>124</sup>

Given that the Justices have nothing but lawyering techniques to set limits on federal power, it’s no surprise that lawyers’ worst habits pop up in opinions written by some of law’s finest craftsmen. The Justices parse the language of prior cases as if they were statutes<sup>125</sup> and split words that had long been read together without a good explanation as to why.<sup>126</sup> A constitutional clause that the Justices had repeatedly condemned as “the last, best hope of those who defend ultra vires congressional action”<sup>127</sup> miraculously becomes a tool for limiting congressional power.<sup>128</sup>

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<sup>123</sup> Even the active/inactive distinction the Court has drawn depends largely on the level of generality at which the activity is cast. Jack Balkin, *Teaching Materials for NFIB v. Sebelius*, BALKINIZATION (July 17, 2012, 8:50 AM), <http://balkin.blogspot.com/2012/07/teaching-materials-for-nfib-v-sebelius.html> [<http://perma.cc/AR5L-V4VF>] (“[P]eople may be active or inactive in commerce depending on how broadly we describe the market they participate in (health care, health insurance, purchase of over-the-counter remedies, etc.) and depending on how broadly we consider the relevant time frame . . .”).

<sup>124</sup> *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

<sup>125</sup> Consider, for instance, Chief Justice Roberts’s effort to buttress the Court’s distinction between activity and inactivity by citing references in prior cases to the word *activity*, *NFIB*, 132 S. Ct. at 2587 (opinion of Roberts, C.J.), even though those cases’ authors weren’t contemplating the distinction.

<sup>126</sup> *E.g.*, *Bond*, 134 S. Ct. at 2101 (Scalia, J., concurring in the judgment) (concluding that a law can be necessary but not proper); *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.) (same); *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (same).

<sup>127</sup> *Printz v. United States*, 521 U.S. 898, 923 (1997); *see also Comstock*, 130 S. Ct. at 1983 (Thomas, J., dissenting) (quoting *Printz*, 521 U.S. at 923); *Raich*, 545 U.S. at 52 (O’Connor, J., dissenting) (quoting *Printz*, 521 U.S. at 923).

<sup>128</sup> *Compare* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819) (“[The Clause] purport[s] to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted.”), *with* *LaCroix*, *supra* note 58, at 2051 (noting that the Court’s analysis of the Necessary and Proper Clause under the current case law “tends, paradoxically, to constrain federal power”).

Because in some cases the whole game is determined by the level of generality at which the challenge is cast,<sup>129</sup> one is hard pressed to explain the differences between cases. Why does a “gaping hole”<sup>130</sup> in a comprehensive regulatory scheme license Congress to regulate activities outside the ambit of the Commerce Clause when medical marijuana is involved but not healthcare insurance? Can it really be true that the failure to regulate the private growth of marijuana for individual medical use is *more* of a threat to drug enforcement efforts than abolishing the individual mandate is to the Patient Protection and Affordable Care Act of 2010’s<sup>131</sup> (ACA) effort to make reasonably priced healthcare universally available? How do we distinguish between Justice O’Connor’s claim (in dissent) that upholding the regulation in question amounts to “declar[ing] everything economic”<sup>132</sup> and Chief Justice Roberts’s claim (for the Court) that upholding the individual mandate does precisely the same thing? Why is the “congruence and proportionality” test so important for *Boerne* but entirely absent in *Shelby County*? When did Article I analyses shift, as LaCroix notes, from identifying a sensible connection between an enumerated power and a subject area to detecting a “formalistic, quasi-jurisdictional nexus between specific individuals and federal instrumentalities”?<sup>133</sup> I tell my students that the use of italics in an opinion is a tell, a signal of a weak argument because the court is substituting emphasis for reasoning. Keep that in mind when you next read the Commerce Clause portion of *NFIB*.

The most frustrating cases are those in which distinctions that have never played much of a role in modern federalism doctrine suddenly become essential — commercial versus noncommercial, economic versus noneconomic, the truly local versus the truly national, action versus inaction, necessary but not proper, remedies versus remedies that are “congruent and proportional,” enumerated powers versus enumerated powers “carried into execution,” a power versus a “great substantive and independent power.”<sup>134</sup> These notions become salient even

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<sup>129</sup> *Raich* provides the most telling example, as levels of generality are largely what divide the majority from the dissent. Similar tensions can also be seen between cases. Compare, for example, *NFIB* and *Raich*.

<sup>130</sup> *Raich*, 545 U.S. at 22.

<sup>131</sup> Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of the U.S. Code).

<sup>132</sup> *Raich*, 545 U.S. at 50 (O’Connor, J., dissenting).

<sup>133</sup> LaCroix, *supra* note 58, at 2077.

<sup>134</sup> LaCroix suggests that the idea of coercion “had all but [been] discarded in the decades since the 1930s,” only to reappear in *NFIB*. *Id.* at 2085–86; see also Lyle Denniston, *A Giant Hole in the Safety Net?*, SCOTUSblog (June 28, 2012, 8:55 PM), <http://www.scotusblog.com/2012/06/a-giant-hole-in-the-safety-net> [<http://perma.cc/6MVK-ZDJM>]. For skeptical takes on its reappearance, see Huberfeld et al., *supra* note 41, at 46–76; and Charlton C. Copeland, *Beyond Separation*

though the Court itself cannot offer a satisfying account of how to define them.<sup>135</sup> The categories are announced as if they have content when, at bottom, they involve little more than renaming the problems the lawyers have already been debating.

When pressed, the Justices blithely assure us that these are distinctions with a difference. Justice Breyer's promise that the links between Congress's Article I powers and civil commitment were not "too attenuated"<sup>136</sup> evidently provided cold comfort for the dissenters. The idea that an earlier case involved "individual applications" of a statute has become a go-to favorite when the Court wants to draw distinctions, although it's not clear why the Court thinks it's a distinction with a difference.<sup>137</sup> Or consider Justice Roberts's insistence that "[n]o matter how 'inherently integrated' health insurance and health care consumption may be, they are not the same thing: They involve different transactions, entered into at different times, with different providers."<sup>138</sup> They are also spelled differently. But the key to drawing distinctions is not to argue they exist, but to explain why they matter.

You might argue that it's just a coincidence that there's so much analytic slippage in cases that defined federal power in isolation, and to be fair, it's an excruciatingly small data set. But these differences exist even within the same line of cases. For example, *Boerne*, which views federal power in isolation, is terribly abstract, both in terms of its test and its applications. The phrase "congruent and proportional" could be a test that lets Congress do whatever it wants<sup>139</sup> or it could be a test that encourages judges to dig into whether the congressional record identifies constitutional harms in enough states.<sup>140</sup> Meanwhile, for all its many demerits, *Shelby County's* state-focused equality approach offers a concrete and intuitive — albeit wrongheaded — test for evaluating the exercise of congressional power. And note that

in *Federalism Enforcement: Medicaid Expansion, Coercion, and the Norm of Engagement*, 15 U. PA. J. CONST. L. 91, 162–65 (2012).

<sup>135</sup> Chief Justice Rehnquist had the good grace to admit as much. See *United States v. Lopez*, 514 U.S. 549, 566–67 (1995).

<sup>136</sup> *United States v. Comstock*, 130 S. Ct. 1949, 1963 (2010).

<sup>137</sup> See, e.g., *NFIB*, 132 S. Ct. 2566, 2593 (2012) (opinion of Roberts, C.J.) (regulating the growth of medical marijuana for home consumption involved "individual *applications* of a concededly valid statutory scheme" but the individual mandate does not (quoting *Raich*, 545 U.S. at 23 (emphasis added))); *Raich*, 545 U.S. at 23 (distinguishing *Lopez* and *Morrison* on the grounds that they were challenges to provisions of a statute whereas *Raich* involved "individual applications" of a statute).

<sup>138</sup> *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.).

<sup>139</sup> See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729–30, 735 (2003).

<sup>140</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 626–27 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88–91 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640–41, 645–48 (1999).



*Shelby County* doesn't even bother citing the *Boerne* test, preferring instead to define federal power entirely vis-à-vis the states.

The different approaches to defining federal power even seem to explain differences *within* the opinions. *Lopez* and *Morrison*, for instance, are better lawyered when the Court attacks the dissents' definitions of commerce rather than defends its own — when it shields its doctrinal rule from attack rather than fashions the rule in the first place. And the grist for those attacks? The Court turns its attention to the states and rejects a definition of commerce that would allow Congress to regulate local crime, family law, or the curriculum for local schools — all of which have traditionally fallen within the ambit of the states' police powers.<sup>141</sup> The most sure-footed parts of these opinions, in other words, are those that return to the touchstone of state sovereignty.

The same is true of *NFIB*. While most of Chief Justice Roberts's analysis is all but devoid of references to the states, a relational account is central to the Spending Clause ruling. There the Chief Justice rehearses many of the tropes of the sovereignty-centered opinions, including those having to do with accountability and independence.<sup>142</sup> It's not a coincidence that the Spending Clause analysis is also the most deeply intuitive portion of the opinion. It rests on a simple premise: Congress can't pull the rug out from under the states by radically altering the duties associated with a cooperative federal regime. You may not think much of the idea, but at least you can wrap your head around it. And the idea had enough intuitive power to pull in the votes of thoughtful centrists like Justices Breyer and Kagan, neither of whom has demonstrated any hostility to federal power.

Or, returning us to *Bond*, compare two decisions written by the same Justice within a short time of one another. Setting aside the inconvenient fact that the statute in *Bond* was not ambiguous, the rest of the opinion is much easier to follow than almost anything Chief Justice Roberts said about the Commerce Clause in *NFIB*. If you worry about Congress inadvertently treading on state power in implementing treaties, it makes perfect sense to impose a clear statement rule. In *NFIB*, the fit between means (finding that the individual mandate was not an integral part of a statute regulating commerce) and ends (individual liberty) is far more attenuated. After all, the Court isn't carving out an area free from federal regulation; it's just limiting what can be done within the interstices of federal power.

I don't mean to suggest that the cases that examine federal power in isolation are just examples of empty formalism, nor do I mean to

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<sup>141</sup> *Morrison*, 529 U.S. at 613, 615–16; *United States v. Lopez*, 514 U.S. 549, 564–68 (1995).

<sup>142</sup> *NFIB*, 132 S. Ct. at 2602–03 (opinion of Roberts, C.J.).

suggest that the Justices are just manipulating the doctrine to suit their own ends. But it's hard to make sense of a doctrinal choice without an overarching frame to explain its significance, and the Court doesn't have one when it examines federal power in isolation. There are too many tools in lawyers' toolboxes. There are always canons and counter-canons, moves and countermoves, cases that can be parsed like statutes and new terms to invent, strategies for pushing a case up and down the ladder of generality. What the Court needs is a mediating theory to help it identify which canons to choose, which moves to make, which level of generality to pick.

If you pull states into the mix, it's easier to solve the core puzzle embedded in Article I challenges — how far to follow the causal chain. It's easier to stop when you bump into something, especially when that something is a core state power. It's easier to say something has gone too far than to define how far it can go. And the past always provides a clearer roadmap than the future.

Most importantly, it's easier to translate the abstract principle that motivated judicial action in the first place — that the federal government is a government of limited powers — into concrete doctrine when you have a sensible means/ends account for doing so. The Justices think they know what states do, and they are therefore confident in their ability to decide when Congress has unduly interfered with the role states are supposed to play in a federal system.

It's much harder to wrap one's head around what role the federal government is supposed to play in a federal system,<sup>143</sup> especially when the states are sidelined from the inquiry. The Court's task is made even more difficult because it addresses each source of federal power seriatim (the Commerce Clause, the Spending Clause, and so on).<sup>144</sup> When the Court analyzes the sources of federal power one by one, it tends to look only to means — the individual powers identified in Article I — rather than to the larger ends they serve together. Little wonder that the Court focuses so heavily on the text of individual provisions and parses them for all they are worth. It's got nothing better.

Contrast this approach with the sovereignty account. There, as I note above, the relationship between means and ends is logically ordered, with a power (sovereignty) properly understood as a means to an end. And note that it's the Eleventh Amendment cases, where sovereignty is sometimes mistaken for an end unto itself, that bear the strongest resemblance to the cases that define federal power in isolation.

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<sup>143</sup> For one such effort, see Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 1115 (2010).

<sup>144</sup> Thanks to Dan Richman for suggesting this point in his wonderful comments on this Comment.

The fact that the Court doesn't have a broad-gauged account of the ultimate ends the federal government serves may help explain why the cases that view congressional power in isolation are so inchoate. After all, if the Court doesn't have a sense of what the federal government is supposed to do, it cannot have a sense of what it's *not* supposed to do.

Perhaps the real problem is that the Court knows only what the federal government is not supposed to do. At present, the only thing the Court seems to be able to tell us about the federal role in a federal system is that it's a limited one. Whereas the Court limits federal power in the sovereignty-centered cases to preserve the states' important role in a federal system, in the cases that define Congress's power in isolation the Court seems to be imposing limits for their own sake. It cannot tell you why it imposes limits here but not there. It cannot tell you which is the exception and which the rule. Which means it cannot expect that this doctrinal line will endure a change in the Court's personnel, or perhaps even a change in circumstances.

In this respect, the Court's decades-old effort to revive federalism looks much like its effort to keep it alive in the years leading up to the New Deal, when the Court came up with one distinction after another to limit federal power. The nationalists have long mocked as empty formalism the distinctions the Court drew between activities in the stream of commerce and those located at its throat, between products moving from state to state and those that have come to rest. And they are right to do so. But the nationalists haven't absorbed the tragic underpinnings of this chapter of the Court's history. They miss that there was something admirable about the Justices' stubborn refusal to abandon the field until threatened by the President himself. The Justices of that time were sophisticated actors, more than capable of recognizing the instability in the doctrine. But they thought the Constitution required them to impose limits, and they did their level best. The trouble was that the doctrine failed them. As a result, the Justices who acted out of respect for law as a craft could not fashion doctrine that met the standards of craft. Those cases involved limits for limits' own sake, bearing little relationship to any sensible account of how state-federal relations ought to function.

Or perhaps the real problem with *NFIB* and its doctrinal traveling companions is that the means and ends are too closely related. There is "no daylight," to borrow the Solicitor General's phrase, between the means (limiting the federal government's power) and ends (a limited federal government). On this formulation, all the Court has done is allowed means to bleed into ends. The Court, like its pre-New Deal counterpart, is pursuing limits for limits' sake.

I wonder whether the Justices sense that they need *something* to push up against when defining federal power — some account of means and ends to tell them when federal power should be limited and when it should not. Why else would we see paeans to individual liber-

ty springing up so often in these opinions (even those not penned by Justice Kennedy)? The sovereignty-centered approach helps the Court define federal power in relation to something else. An individual rights account serves roughly the same purpose. It provides a different but equally familiar form of negative space to bound federal power (here, the protected zone we call individual liberty). Once again, *Bond* — especially in its first iteration — is part of this story with its odes to the relationship between federalism and liberty.

The problem is that individual liberty isn't nearly as sensible a means/ends account as sovereignty when it comes to federalism fights. Usually rights talk prevents both the state and the federal governments from invading parts of our lives. But in federalism cases, we aren't shielding individuals from regulation; we're just shielding them from *federal* regulation, which means that the states could always step in. This isn't *Lochner*, after all. The Justices often gloss over this "counterintuitive"<sup>145</sup> notion, although they occasionally try to explain themselves, as Justice Kennedy did in *Bond I*. That defense is strongest where Justice Kennedy describes the relationship between federalism and positive liberty. Mirroring his opinion in *United States v. Windsor*,<sup>146</sup> he notes that states give people "a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power."<sup>147</sup> The argument is considerably weaker when it comes to negative liberties, however, which may explain why the best Justice Kennedy can come up with is a scant three sentences on why it's useful to deny a single government jurisdiction "over all the concerns of public life."<sup>148</sup> Given the shortcomings of the liberty account, it's telling that the Justices nonetheless invoke it so often. Perhaps it reflects a felt need to measure congressional power against something other than itself.

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Laid against this backdrop, the Court's punt in *Bond* makes a good deal more sense. It was supposed to be a case about the limits of federal power under Article I and presumably began with at least four Justices confident of a fifth vote to impose such limits. That majority, however, unwound, perhaps because the analysis became unmanageable even for a Court hostile to federal action. The federal government had insisted that Congress enjoyed the power to implement a chemical weapons treaty under the Necessary and Proper Clause, in-

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<sup>145</sup> *Bond I*, 131 S. Ct. 2355, 2364 (2011).

<sup>146</sup> 133 S. Ct. 2675 (2013).

<sup>147</sup> *Bond I*, 131 S. Ct. at 2364.

<sup>148</sup> *Id.*

viting the Court to write yet another opinion that examined federal power in isolation. Both Justice Scalia's and Justice Thomas's dissents analyze the case in just this way and, not unexpectedly, run into the "inference upon inference" problem.<sup>149</sup> The Court instead threw in the towel, returning to what must have felt like a tried-and-true strategy for limiting federal power — defining it in relation to the states. Indeed, it is telling that the Court turned to *Gregory* for help, as it provides a textbook example of this strategy.

### III. GETTING A BETTER MAP

So where should the Court go from here? Returning to a sovereignty-centered federalism isn't going to save the Court from its follies. While the Court is much more likely to generate enduring legal doctrine if it begins with something manageable, like the role that states play in the federal system, the point is to build doctrine that's worth keeping around. And while a sovereignty account is admirably concrete and manageable, it's also wrongheaded and out of date. The Court may have chosen the right starting point for its analysis, but it's still got the wrong map.

The Court needs a relational account. It needs to think hard about how the states and the federal government interact. But it should think about those interactions differently. As intuitively appealing as the sovereignty argument is, it can't possibly survive 21st century realities. It can't survive in a world where sovereignty is not to be had, where regulatory overlap is the rule, where states' most important form of power lies not in presiding over their own empires but in administering the federal empire.<sup>150</sup>

I suspect the Justices sense the sovereignty account's frailties as well. Why else would the Court so often struggle to impose limits on federal power from the vantage point of federal power? Why doesn't it more often take the easier path it chose in *Bond* and return to the more manageable, more comfortable, more comprehensible sovereignty-centered approach? Something is pushing the Justices toward a different paradigm, and it may be the sense that, in this day and age, invocations of state sovereignty aren't going to get them that far.

It's hard enough in a short Comment to offer a sensible diagnosis of the Court's failures, let alone a cure. But if the Court wishes to

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<sup>149</sup> Justice Thomas acknowledges as much when he admits that the distinction he seeks to draw between "international intercourse and matters of purely domestic regulation may not be obvious in all cases." *Bond*, 134 S. Ct. at 2110 (Thomas, J., concurring in the judgment). Thanks to Sundeep Iyer for suggesting this point.

<sup>150</sup> For a description and an effort to link the sovereignty account to the dominant strains of federalism literature, see Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

change course, there are plenty of maps available, and some are better suited for its journey than others.

If the Court is hunting for a new mediating theory, it should retain the central insight of the sovereignty cases — that federal power must be defined in relation to the states — but take it in a different direction. The problem with the Court's relational account of federal power is that it's not sufficiently relational. It fails to capture the deeply integrated, highly interactive relationship that exists between the states and federal government in so many regulatory arenas.

For starters, it would help if the Court paid attention to the last sixty-five years of academic thought and ditched its sovereignty account.<sup>151</sup> Almost no one in the academy thinks much of the sovereignty model. To the contrary, beating up on the model is something of a rite of passage for federalism scholars. And with good reason.

In my view — and here I'm admittedly an outlier — much of that skepticism should be extended to the autonomy account as well,<sup>152</sup> which still dominates the federalism literature. That account is little different from the sovereignty account. It rests upon the same conception of state power — the notion that states should be able to preside over their own empires.<sup>153</sup> It simply has softer edges and less formal protections, which makes it easier for law professors — always skeptical of formalist distinctions — to stomach.

We may be heading toward the moment when the sovereignty/autonomy debate will be little more than an academic sideshow. The state is, to be sure, sometimes sovereign and sometimes autonomous.<sup>154</sup> But in an increasingly large number of arenas, especially those where state-federal tussles are most likely to reach the courts, the state and federal governments govern shoulder-to-shoulder in a tight regulatory space. Both the sovereignty and autonomy accounts depend on the presence of negative space to define the borders of federal power, and there's not much of it left anymore. The federal government's influence is pervasive, and its programs have washed across virtually every one of the states' shorelines. An effort to hold back federal power based on either account is an effort destined for failure. It would be better for the Court to learn the lesson of Cnut, a great king. A king

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<sup>151</sup> The tradition dates back at least to Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

<sup>152</sup> Gerken, *supra* note 150, at 11–21. Happily, my companions are few but choice. See, e.g., Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920 (2014).

<sup>153</sup> Gerken, *supra* note 150, at 11–21.

<sup>154</sup> See Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012).

who became great only after he recognized that even kings cannot hold back the tide.<sup>155</sup>

That is not to say, as the nationalists would have it, that the states are now irrelevant or completely swamped by the tides of federal power. Just the opposite is true. The states retain a robust and vibrant role in our highly integrated system despite the ubiquity of national regulation and the integration of our political and economic realms. States are important, but their importance stems from integration not autonomy, the power of the servant not the power of the sovereign, insider privileges not outsider status.<sup>156</sup> The states and federal government are regulating together, with the federal government often depending heavily on states to implement federal policy.<sup>157</sup> State politics are intimately intertwined with federal politics; indeed, they often fuel them.<sup>158</sup> The same holds true on the economic front. These facts allow the states to pursue their traditional roles of resisting federal power and serving as laboratories of democracy, all the while carrying out other, equally important roles, including “improving national politics, strengthening a national polity, bettering national policymaking, entrenching national norms, consolidating national policies, and increasing national power.”<sup>159</sup>

In this respect, the Court’s efforts to keep federal and state officers separate have been foolish, not just futile. Its attitude toward state-federal relations is perfectly captured by Justice O’Connor’s insistence in *New York* that “[s]tate governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government’s most detailed organizational chart.”<sup>160</sup> That statement confirms Justice O’Connor’s status as an unreliable narrator. One need only look to the federal government’s organizational charts for health care or environmental regulation or telecommunications or workplace safety to realize she wrote with blinders on.<sup>161</sup> And one need only examine how these federal statutes are administered to realize that one of the

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<sup>155</sup> See Colin Hay, *King Canute and the ‘Problem’ of Structure and Agency: On Times, Tides and Heresthetics*, 57 POL. STUD. 260, 261 (2009).

<sup>156</sup> Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1265–71 (2009); Gerken, *supra* note 150, at 35–44; Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633 (2006).

<sup>157</sup> See, e.g., Abbe R. Gluck, Essay, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011).

<sup>158</sup> Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

<sup>159</sup> Gerken, *supra* note 54, at 1893.

<sup>160</sup> *New York v. United States*, 505 U.S. 144, 188 (1992).

<sup>161</sup> One cannot even be generous by suggesting it’s merely an outdated chart given the states’ early role in the federal administrative structure. See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 52 (2012).

most important forms of state power now lies inside the federal administrative state.<sup>162</sup>

Ours is thus a state of affairs that many sovereigntists *and* nationalists failed to predict and that some continue to resist. The sovereigntists insist that the states are losing power, in large part because they refuse to recognize cooperative federalism as federalism at all.<sup>163</sup> And the nationalists miss how powerful state agents can be in a principal-agent relationship. If anything, it's the nationalists — who have long chided their pro-federalism colleagues for clinging to outdated ideas about state power — who are most behind the times. They miss the important role states are playing in so many national programs.

Maybe both groups have just been using the wrong metaphor. If you fear that waves of federal power will swamp the states, your natural impulse will be to build a levee, and you are sure to learn the same painful lesson as Cnut. If you only see the federal tide, you miss how much life exists beneath the waves. It would be better if we thought of states as reefs rather than isolated islands. Perhaps then the sovereigntists would worry less about the fact that there's water, water everywhere, and the nationalists would not be so quick to dismiss states' importance. That's because states are sites of power. Like an ancient wreck or a scuttled ship or used tires tossed into the ocean, all of which develop into vibrant reefs, sites of power quickly attract all manner of political life. Political power attracts political interests, which build their power bases around those regulatory sites, and a political ecosystem springs up around them. Federal power flows through these reefs, to be sure, and yet states stand and nurture worlds of their own.

If the Court is going to build a relational account for restricting federal power, that account must reflect these realities. The states and federal government have forged vibrant working relationships. They are not — as *both* the autonomy and sovereignty accounts would have it — engaged in the governance equivalent of parallel play.

This is by now a familiar point in many arenas,<sup>164</sup> but it might seem like an odd one to make here. Think back to the Chief Justice's taking umbrage in *Kebodeaux* at any suggestion that the federal gov-

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<sup>162</sup> Heather K. Gerken, *The Federalis(m) Society*, 36 HARV. J.L. & PUB. POL'Y 941 (2013).

<sup>163</sup> See, e.g., Richard A. Epstein & Mario Loyola, *Saving Federalism*, NAT'L AFF., Summer 2014, at 3; Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 559 (2000).

<sup>164</sup> Proponents of this argument describe federalism as polyphonic, dynamic, and interactive, amongst other appealing adjectives including . . . “relational.” See Gerken, *supra* note 150, at 18–21; Gerken, *supra* note 54; see also Charlton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 WM. & MARY BILL RTS. J. 511 (2011) (defining federalism as “relational”); David Fontana, *Relational Federalism: An Essay in Honor of Heather Gerken*, 48 TULSA L. REV. 503 (2012) (defining Gerken's account of federalism as “relational”).



ernment enjoys a general police power. The power to police is, of course, at the heart of the state's police power. Surely whatever is left of the "truly local" can be found there. The Court says as much in *Bond*.<sup>165</sup>

And yet. And yet even in this "statist"<sup>166</sup> of state arenas, we see substantial federal-state overlap and intergovernmental cooperation. Criminal law isn't the exception that proves the rule. It *is* the rule.

I'm not talking just about the "federalization" of criminal law, mourned by so many, which puts the lie to the Court's insistence that Congress could not have contemplated the application of § 229 to Bond's conduct. Of course Congress could have contemplated such a possibility. Its criminal legislation has stretched far into traditional state arenas. Indeed, Congress's regulatory reach has extended so far that some of the field's most astute analysts have pointed out that "the difference between the substantive reach of federal criminal law and that of state criminal law has virtually disappeared."<sup>167</sup> That's why the Court itself had no trouble imagining federal prosecutors applying the *same* regulation to someone using the *same* chemicals if she were a domestic terrorist rather than a woman scorned.<sup>168</sup> That's why the Court found it "natural[]" that federal prosecutors charged Bond under the same title of the U.S. Code for the mail theft that was part of her domestic campaign.<sup>169</sup>

And yet. And yet states still retain their dominant role in criminal law. State prosecutions have averaged around 95 percent of national criminal felony cases for over a century and held absolutely steady since the 1980s despite the wave of federal regulations washing across state shores.<sup>170</sup> The federal government lacks the resources to investigate and prosecute the many activities it has criminalized. It depends so heavily on state officials' assistance that experts have classified criminal law as yet another example of cooperative federalism.<sup>171</sup> It is

<sup>165</sup> 134 S. Ct. at 2089 ("Perhaps the clearest example of traditional state authority is the punishment of local criminal activity.").

<sup>166</sup> With apologies to Stephen Colbert.

<sup>167</sup> DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, *DEFINING FEDERAL CRIMES* 8 (2014) (emphasis omitted).

<sup>168</sup> *Bond*, 134 S. Ct. at 2091.

<sup>169</sup> *Id.* at 2085 (discussing charges under 18 U.S.C. § 1708 (2012)).

<sup>170</sup> Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 36 (2012).

<sup>171</sup> See RICHMAN, STITH & STUNTZ., *supra* note 167, at 8–12; see also Klein & Grobey, *supra* note 170, at 45; Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 806 (2004); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2261 (2014). Professor Robert Mikos offers a wonderful example of the muscular role the states play in criminal law enforcement even in the presence of pervasive federal regulation. He argues that because the federal government lacks the resources to enforce its own ban on marijuana, the states are able to "ma[ke] medical marijuana de facto legal within their jurisdictions"

also an area where, like so many others, the federal government has played the supremacy trump card sparingly. Despite the formal power they hold, federal prosecutors give a lot of leeway to state officials. U.S. Attorneys can't afford to exercise that power given their lack of manpower, for one thing. They are reluctant to tread on state officials' toes given how heavily federal officials depend on their state counterparts to do the necessary legwork, for another.

Because the Court holds such mistaken notions of state power — it still looks to Justice O'Connor's organizational chart rather than to the real-world version — it missed what was really happening in *Bond*. Consistent with the sovereignty model, the Chief assumed that real power would follow its formal exercise and that federalizing *this* crime would somehow result in a huge increase in federal enforcement efforts.<sup>172</sup> He thus overlooked the very state of affairs I just described, one in which states retain their central role in criminal law enforcement even as the federal government extends its regulatory reach.

Moreover, even this particular prosecution wasn't an example of federal power gone awry — just the opposite. The federal government wasn't horning in on a state prosecution. Here, the state *declined* to prosecute Bond for all of the mischief she created. Whether or not the U.S. Attorney should have let this one slide, he wasn't muscling out his state counterparts. The state failed to act, and the federal government stepped in as a fail-safe (in a case involving mail theft, to boot). As many have argued — from Professor Robert Cover<sup>173</sup> to Professor Robert Schapiro<sup>174</sup> and onward — the ability of state and federal officials to serve as fail-safes for one another is a feature, not a bug, in a system like ours. One might legitimately worry that this type of fail-safe could generate too many prosecutions in the criminal law context. Once a prosecutor cracks open Title 18, after all, he'll be tempted to thumb through the rest in order to capture a case's full drama. But I don't ever remember the Rehnquist or Roberts Court wringing its hands about putting too many criminals behind bars.

For the skeptics, it's worth remembering two important facts about the regulatory arena that gave rise to *Bond*. First, despite a substantial uptick in federal regulation, policing looks very much like what the Court envisions as the ideal, with states playing a robust role.

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simply by refusing to enforce the federal ban. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1425 (2009).

<sup>172</sup> *Bond*, 134 S. Ct. at 2091.

<sup>173</sup> Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

<sup>174</sup> ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM (2009).

Second, states retain their preeminent role even though courts have not enforced sovereignty-based prohibitions on federal power but instead have permitted the federalization of crime to occur. The courts, in short, have left the states and federal government to do in criminal law what they do in so many areas. Work it out. Tussle and campaign and negotiate and compromise. These policing and prosecutorial relationships have been forged in the crucible of politics. And the result has been a robust system in which states continue to play a crucial role. But they do so as agents in an integrated regime rather than as emperors presiding over their own terrains. That ought to be the story of “Our Federalism” if judges want to avoid its tragic choices going forward.

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Two tasks, then, await the Court should it finally change course. The first is to rethink both the means and ends of federalism in light of the relationships described above. The states do serve an important role in maintaining a healthy national system. But that role involves different ends than the Court has envisioned and different means than the Court has devised.<sup>175</sup> As I argue elsewhere,<sup>176</sup> it’s time for a *détente* between the long-warring camps.

The second is to think long and hard about the difference between first-order and second-order policing and how they can be used to limit the federal government’s reach. It’s a commonplace in other fields that courts have two strategies available to them in many regulatory arenas: they can impose first-order constraints on behavior or they can police second-order conditions that produce the right type of behavior.<sup>177</sup> In antitrust, for instance, the courts don’t regulate price; they ensure that the right conditions obtain for a competitive market. The courts seem especially likely to gravitate toward second-order policing in instances where democratic politics are involved, which explains Ely’s enduring appeal. The Court, for instance, regulates the marketplace of ideas but not the content of speech. It sets the rules for interparty conflict, but it doesn’t pick a winner. So why not regulate the

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<sup>175</sup> See generally Gerken, *supra* note 54.

<sup>176</sup> See Gerken, *supra* note 150.

<sup>177</sup> See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998). These terms are used differently in the federalism literature, where “first order” questions are those “allocating decision making authority between federal and state institutions” and “second order” questions involve “choosing institutions to decide the first order questions.” Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1819 (2005).

rules for state-federal turf wars without deciding where the boundary lines should be drawn?

This, of course, is the basic insight behind a political safeguards account. In my view, a safeguards account relies on the right means (second-order policing) to achieve a well-functioning federal system, but it's been theorized in too narrow a fashion.

Sovereignists have long questioned whether the states can defend their interests through politics, but that is because they have misdiagnosed the current state of affairs. Like the Court, they see the federalization of crime but miss that state agents still prosecute most of it. They see fewer and fewer areas where the states regulate alone but ignore the many areas where state and federal governments regulate together. They rightly notice that state sovereignty is disappearing while missing the powerful role that states play as servants. They valorize one form of power while ignoring others.<sup>178</sup>

Nationalists, meanwhile, have mistaken a safeguards account for an excuse to vacate the field of battle. Perhaps I think this because I prefer tragic heroes like Macbeth and Othello who go out and meet their troubles<sup>179</sup> to passive ditherers like Lear and Hamlet. Nonetheless, if your strategy for limiting federal power depends on the states' and federal government's politicking their way to appropriate limits, you must be sure that the right conditions for politicking obtain.

That's why the better formulation of the safeguards account is the more nuanced one offered by Professor Ernest Young<sup>180</sup> and exemplified in his work and the work of Professor Roderick Hills, among others.<sup>181</sup> Young argues that we need a *Democracy and Distrust* for process federalism, an Elyian account of when courts should regulate the processes in which the state and federal governments negotiate with one another.<sup>182</sup> Hills has shown us how that works in practice, refor-

<sup>178</sup> For a critique, see Gerken, *supra* note 154. For an effort to systematize these differences, see Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349 (2013).

<sup>179</sup> To butcher a line from Shakespeare's best comedy.

<sup>180</sup> Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1395 (2001).

<sup>181</sup> See, e.g., Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998). Professor Erin Ryan frames it differently, but her important work on "negotiating federalism" is directed at a similar project. See, e.g., ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2012); Erin Ryan, *Negotiating Federalism Past the Zero-Sum Game*, ADMIN. & REG. L. NEWS, Fall 2012, at 4.

<sup>182</sup> Young, *supra* note 180, at 1395. It is de rigueur among academics to roll their eyes at Ely's insistence that process theory was substantively "neutral" given how thoroughly that claim has been dismantled. See, e.g., Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). But that's hardly a reason to abandon process theory itself. As Professor Michael Dorf has pointed out, Ely's work has enduring appeal because its (indisputably) substantive underpinnings are so powerful and intuitive. Michael C. Dorf, *The Coherentism of Democracy*

mulating the Court's anticommandeering doctrine not as a means of protecting state sovereignty but as a means of creating the right conditions for federal-state bargaining.<sup>183</sup>

The problem, however, is that those who have thought the most about the political safeguards are those who subscribe to an autonomy account of state power. They try to imagine politics safeguarding state autonomy — protecting the dwindling zone where the states regulate alone — when they should be trying to imagine politics safeguarding healthy state-federal relations in all of their myriad forms.<sup>184</sup> Hills and Young are both good examples. Their process-based accounts are aimed at preserving state autonomy. One might think quite differently about these questions if one aimed at producing the right kinds of cooperative and uncooperative relationships between state and federal officials.<sup>185</sup>

A related problem with the safeguards account is that, consistent with an autonomy account, it focuses on the moment at which Congress passes legislation that slips into traditional state domains. But, as the implementation of the ACA makes clear, this one-off account is too narrowly drawn to capture the full range of federal-state politicking, which extends well past a statute's passage.<sup>186</sup> Elsewhere, I've written about the "federalist safeguards of administration"<sup>187</sup> to emphasize the role that states play in the federal administrative structure. But the word *administration* is useful here, too, as it reminds us of the quotidian interactions that a well-formulated safeguards account must encompass. The key, then, is to imagine what day-to-day bargaining conditions should obtain where state and federal governments are regulating together.<sup>188</sup>

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*and Distrust*, 114 YALE L.J. 1237, 1253 (2005). One could, of course, take a harder line than I suggest here and leave these questions entirely to politics, as do Professors Jesse Choper and Larry Kramer. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 2–3 (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 287–93 (2000). I'm certainly open to a limited judicial role given the limits of what courts can do. But, as noted above, there are some instances in which the courts must do something, *see supra* p. 92, and I'd much prefer they deploy an appropriately tailored safeguards account when they do.

<sup>183</sup> Hills, *supra* note 181, at 819.

<sup>184</sup> For an illuminating critique of this tendency, see Bulman-Pozen, *supra* note 152.

<sup>185</sup> *See, e.g.*, Bulman-Pozen & Gerken, *supra* note 156, at 1295–302 (arguing that if one's sole aim were to promote state resistance within the administrative state, the anticommandeering rule might need to be rethought).

<sup>186</sup> Jessica Bulman-Pozen and I have described these as the "ex post safeguards of federalism" because they take place after legislation has been passed. *Id.* at 1293. Thanks to Dan Richman for encouraging me to discuss them here.

<sup>187</sup> *Id.* at 1286; Gerken, *supra* note 150, at 40.

<sup>188</sup> Ryan and Gluck have done the most systematic work on this front. *See* RYAN, *supra* note 181; Gluck, *supra* note 55.

Happily, the Court has already set down (at least partially) the right path. The most important part of *NFIB*, for instance, is the Court's effort to think harder about the conditions of federal-state bargaining after a relationship has been forged. I'm not particularly persuaded by the Court's first stab at the problem. But still. This section isn't just the most deeply intuitive part of the case but also the only one premised on the notion of federal-state overlap and interdependence.

So, too, the one thing we can celebrate in *Bond* is the Court's reliance on a clear statement rule. The Court takes the wrong path to get there, relying too heavily on the idea of separate spheres to announce it.<sup>189</sup> As a result, the Court misapplies the rule, finding ambiguity where the statute is clear. Because the Court continues to subscribe to the outdated notions undergirding the sovereignty account, it believes that applying § 229 to Bond's conduct would lead to a federal annexation rather than the type of state-dominated, cooperative relationships we see in many other areas of federal law. One overeager U.S. Attorney does not a federal takeover make, and the Court should have known better given how few local prosecutions had taken place under the statute. But at least the Court paid attention to Gluck's observation that most of the real work in federalism takes place at the statutory level, not the constitutional one.<sup>190</sup> Moreover, one could imagine re-fashioning *Gregory* and now *Bond* into the type of second-order rules that courts could use to ensure healthy state-federal relations in areas, like criminal law, where the state and federal governments are regulating together. After all, if the point is for the states to politick about shared regulatory terrain, they must know what they are politicking about.

In addition, the Court already has a working model for refereeing institutional competition in a world where those institutions are integrated rather than separate. As I've written in the pages of this *Review*, we have two theories about how to check an institution at the horizontal level. The first, the separation of powers, operates like a sovereignty account, but on the horizontal level. As the moniker suggests, the diffusion of power depends on separation and autonomy, with the Court helping ensure that each institution swims in its own lane. The second model for diffusing power horizontally, checks and balances, depends on integration, interdependence, and overlap, to function. As I wrote in the 2009 Foreword, what the courts need to do is develop a "checks and balances" account for vertical relations, an account of federalism in which:

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<sup>189</sup> Thanks to Erica Newland for suggesting this point.

<sup>190</sup> See Gluck, *supra* note 55.

Co-governance is . . . the model[,], an ongoing, iterated game . . . [where] what matters is how the two institutions partner with one another. The key is not to figure out who wins, but to understand how the center and periphery interact and to maintain the conditions in which they can productively cooperate, conflict, and compete.<sup>191</sup>

### CONCLUSION

Federalism's tragic tale has many unexpected lessons. Bad theory can make good law or at least halfway decent doctrine. Sovereignty is a campfire story — an account of federalism so far distant from day-to-day realities that it borders on the implausible. But it's helped the Court generate case law that is reasonably manageable and coherent. The remainder of the Rehnquist and Roberts Courts' federalism decisions fall short even of this generous standard.

There are many questions going forward. Whether the Justices can hold fast to the central insight of the sovereignty cases — that federal power must be defined in relation to the states — while jettisoning their implausible views about how state-federal relations work in practice. Whether they can imagine states as reefs, not islands, in the sea of federal power. Whether they can adapt the safeguards account to day-to-day interactions rather than just to one-off legislative decisions. Whether they can conceive of state-federal relations much as we imagine the relationship among the federal branches, a system in which “[p]ower is diffused [through] a messy structure of overlapping institutions that depend on one another to get anything done.”<sup>192</sup> But the key question is whether they can turn federalism's tragic story into a tale worth telling.

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<sup>191</sup> Gerken, *supra* note 150, at 36–37 (footnote omitted).

<sup>192</sup> *Id.* at 34.